SAS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.816 OF 2004

The Commissioner of Income-tax ..Appellant.

V/s.

M/s.Tip Top Typography ..Respondent.

Mr.A.S.Rao with P.Sahadevan for appellant.

Mr.P.J.Pardiwala with Rajesh Shah for respondent.

CORAM : F.I.REBELLO AND
J.P.DEVADHAR, JJ.

DATED : 11TH SEPTEMBER, 2007.

P.C. :-

The revenue has preferred this appeal on the questions of law as formulated as under:-

A) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in deleting the addition of Rs.4.21 crores on the ground that the property was purchased by a firm and change in constitution of the firm would not amount to "transfer of asset" as property continued to be owned by the assessee firm and, therefore, not liable to capital gain tax ?

B) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the property i.e. 58, Sheth Chambers, Dr.V.B. Gandhi Marg, Fort, Mumbai was purchased by the assessee firm and the assesse firm continued to be the owner of the property and, therefore, there was no transfer of the

asset by the assessee firm merely because there was change in constitution of the firm and, therefore, deleted the addition of Rs.4,21,000/- made by the assessing officer on account of capital gain ?

C) Whether the assessee firm which transferred the property to the income partners within the meaning of Sec.45(4) are liable to capital gain tax assessed by the assessing officer ?

D) Whether the distribution of assets of the firm among the retiring partners as per the partnership deed dated 11/11/1995 would amount to transfer of capital assets liable for capital gains and business profits taxable u/s. 45(4) of the I.T. Act, 1961 ?

2. The learned Tribunal by its order dated 28th July, 2003 addressed itself to the question whether there is transfer of assets by the assessee firm. The learned Tribunal noted that the asset was purchased by the firm. There is only a change of constituion in the firm twice on 18/5/1995 and also on 11/11/1995. The further finding is that the firm subsists.

3. The contention on behalf of the revenue is that admission of new partners would tantamount to transfer of assets of the firm to the new partners. That has been clearly negatived by the Tribunal. In so far as the outgoing partners are concerned, the goodwill received by them has been taxed to capital gains. The asset of the firm continues to be the assets of the firm and mere fact that additional

partners have been admitted or earlier partners have resigned does not result in the transfer of the assets to the new partners who are admitted. In the Judgment in so far as **Smt.Nayantara G. Agrawal V/s. Commissioner of Income-tax** reported in **207 I.T.R. 639** the learned Bench of this Court proceeded on the footing that the firm therein did not carry on any business and consequently the transfer is affected therein was sham and in the light of that the findings recorded therein.

4. In the instant case, there is no such contention except based on the admission of new partners. We consequently find the questions of law as formulated would not arise. Hence appeal is dismissed.

(F.I.REBELL0, J.)

(J.P.DEVADHAR, J.)